BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TROY J. MOODY	)	
Claimant	)	
V.	)	
	)	
KBW OIL & GAS COMPANY	)	Docket No. 1,061,663
Respondent	)	
AND	)	
	)	
AMERICAN INTERSTATE INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant, by W. Walter Craig, requested review of Administrative Law Judge Gary K. Jones' October 14, 2015 Review and Modification Award. Terry J. Torline appeared for respondent. The Board heard oral argument on April 22, 2016, and has carefully considered the entire record.

ISSUES

Does *Ballard*[1] require recalculation of claimant's award or does res judicata or the law of the case doctrine preclude relitigation of such issue?

FINDINGS OF FACT

In an April 28, 2014 decision, the Board determined claimant was permanently and totally disabled, but reduced his award for preexisting impairment based on *Payne*.[2] The Board's ruling was not appealed and it became a final decision.

On August 21, 2015, *Ballard* held the *Ward*[3] method, and not the *Payne* method, determines the credit for preexisting functional impairment when calculating permanent total disability awards. Subsequent to the *Ballard* decision, claimant argued to the judge that the Board erred in reducing his award based on *Payne* and his award should be reviewed and modified based on *Ballard*.

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[1] *Ballard v. Dondlinger & Sons Const. Co.*, 51 Kan. App. 2d 855, 355 P.3d 707 (2015).

[2] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

[3] *Ward v. Allen County Hosp.*, 50 Kan. App. 2d 280, 324 P.3d 1122 (2014); see also *Jamison v. Sears Holding Corp.*, No. 109,670, 2014 WL 1887645 (Kansas Court of Appeals unpublished opinion filed May 9, 2014) and *Ballard v. Dondlinger & Sons Const. Co.*, No. 109,905, 2014 WL 1887654 (Kansas Court of Appeals unpublished opinion filed May 9, 2014).

The judge denied claimant's application for review and modification stating:

> This Court is persuaded by *Scheidt*, which says at 42 Kan. App. 2d 261: '[T]he statute [K.S.A. 44-528] provides for modification when an employee's functional impairment or work disability has changed but says nothing about modifying an award when caselaw changes." Absent statutory authority, this Court is not free to modify a final award. The interpretation of K.S.A. 44-528 suggested by the Claimant, that an . . . award is "inadequate" due to a change in the caselaw and therefore subject to modification, has not been upheld by the courts. The Claimant does not allege that there are any new facts to support a change in the Claimant's functional impairment or work disability.[4]

On appeal, claimant argues the *Ballard* method should be used to calculate his award and result in him receiving about an additional $15,000. Claimant argues his award is inadequate and *Garrison*[5] allows review and modification of an inadequate award. Respondent points to *Scheidt*,[6] which holds that issues decided in an award may not be litigated again, unless specifically provided for by statute, and also argues K.S.A. 44-528 does not specifically provide for modification on the basis of a change in case law alone.

PRINCIPLES OF LAW

An award may be modified when changed circumstances either increase or decrease the injured worker's disability. K.S.A. 2011 Supp. 44-528(a) states:

> Except lump-sum settlements approved by the director or administrative law judge, any award or modification thereof may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, pursuant to the provisions set forth in K.S.A. 44-510b, 44-510c, 44-510d or 44-510e, and amendments thereto, as may be applicable.

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[4] ALJ Award (Oct. 14, 2015) at 3.

[5] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 929 P.2d 788 (1996).

[6] *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 211 P.3d 175 (2009), *rev. denied* 290 Kan. 1095 (2010).

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[7] If there is a change in the claimant's work disability, then the award is subject to review and modification.[8] In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[9] Our appellate courts have held that there must be a change of circumstances, either in a claimant's physical or employment status, to justify modification of an award.[10] The change does not have to be a change in claimant's physical condition; it could be an economic change.[11]

Review and modification is not available to relitigate all issues. Res judicata forecloses "a finding of a past fact which existed at the time of the original hearing."[12] A "workers'-compensation award is in most respects like a court judgment and subject to res judicata: issues necessarily decided in determining the award may not be relitigated unless specifically provided for by statute."[13] K.S.A. 44-528(a) "provides for modification when an employee's functional impairment or work disability has changed but says nothing about modifying an award when caselaw changes."[14]

Morris[15] states, "[T]he purpose of the modification and review statute was to save both the employer and the employee from original awards of compensation that might later prove unjust because of a change for the worse or better in a particular claimant's condition." *Gile*[16] states, "Any modification is based on the existence of new facts, a changed condition of the workman's capacity, which renders the former award either excessive or inadequate."

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[7] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[8] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

[9] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[10] *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

[11] *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997); *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

[12] *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973). See also *Bazil v. Detroit Diesel Cent. Remanufacturing*, No. 99,613, 2008 WL 5401467 (Kansas Court of Appeals unpublished opinion filed Dec. 19, 2008). ("[I]ssues relating to the initial injury and causation that were previously litigated in the original award may not be relitigated.").

[13] *Scheidt*, 42 Kan. App. 2d at 261; see also *Hughes v. State*, No. 107,108, 2012 WL 3290020 (Kansas Court of Appeals unpublished opinion filed Aug. 10, 2012); *Omar v. Tyson Fresh Meats, Inc.*, No. 106,408, 2012 WL 1920700 (Kansas Court of Appeals unpublished opinion filed May 18, 2012).

[14] *Scheidt, supra,* at 261.

[15] *Morris, supra,* at 531.

[16] *Gile, supra,* at 740.

Collier[17] states:

> The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review § 605 in the following manner:
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> > "The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts."
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> > . . .
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> The cases stating this rule are legion in number, and the rule has been applied in many Kansas cases.

In *Finical*,[18] the Kansas Supreme Court stated, "We repeatedly have held that when an appealable order is not appealed it becomes the law of the case."

K.S.A. 2011 Supp. 44-551(i)(1) provides, in part:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2011 Supp. 44-555c(a) provides, in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

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[17] *State v. Collier*, 263 Kan. 629, 631-32, 952 P.2d 1326 (1998).

[18] *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

ANALYSIS

Claimant's request for review and modification is denied. A change in how the law is interpreted does not impact the finality of the Board's April 28, 2014 decision. Such decision is res judicata and the law of the case, not subject to relitigation.

Garrison, cited by claimant, is distinguishable. *Garrison* involved an award of functional impairment that was not appealed, yet review and modification was nevertheless proper because the injured worker's disability subsequently increased. K.S.A. 44-528 "specifically provides for review where there is a change in the claimant's 'work disability.'"[19] *Garrison* did not involve a worker seeking a greater award based on a change in case law.

Claimant argues review and modification is proper because his award is inadequate in that *Ballard* held the *Payne* method to reduce an award for preexisting impairment was wrong and the *Ward* method controls. However, attempts at modifying an award based on a change in case law have been unsuccessful. For instance, employers argued *Casco*[20] should result in whole body awards for bilateral arm injuries being reclassified as separate scheduled injuries to each arm, but such relitigation was not allowed.[21] Similarly, while injured workers argued *Bergstrom*[22] required recalculation of their awards, the Board rejected reviewing and modifying final and non-appealed decisions.[23] Claimant is not permitted to modify his award based on case law changing.

In this case, there is no change in claimant's condition. Only the interpretation of the law has changed. The Board's April 28, 2014 decision was not appealed and it became final. The finality and certainty of that decision remains just that – final and certain. Our decision is rooted in both res judicata and the law of the case. The amount of claimant's award was decided and not appealed. The policy of promoting the finality of decisions outweighs claimant's interest in an increase in his monetary award based on a change in the case law. Claimant could have appealed the Board's prior award and argued the *Ward* methodology for reducing permanent partial (work) disability awards should apply to reducing permanent total disability awards. Such an appeal could have been made even prior to *Ballard* being decided.

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[19] *Garrison*, 23 Kan. App. 2d at 225.

[20] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[21] *Scheidt*, *supra*; see also *Urbano v. Koch-Glitsch, L.P.*, Nos. 1,008,817 & 1,008,818, 2008 WL 2354913 (Kan. WCAB May 29, 2008); *Findley v. The Boeing Co.*, No. 1,023,487, 2008 WL 651664 (Kan. WCAB Feb. 29, 2008).

[22] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[23] *Van Vo v. Dold Foods, LLC*, No. 1,034,922, 2011 WL 494961 (Kan. WCAB Jan. 3, 2011); *Swathwood v. Medicalodge of Columbus*, No. 270,543, 2010 WL 1918564 (Kan. WCAB Apr. 29, 2010).

CONCLUSIONS

In the Board's April 28, 2014 Order, the amount of claimant's award was determined. No appeal was taken from that Order. As such, that finding became the law of the case and is res judicata. There has been no change in circumstances, other than how the appellate courts interpret the law. Claimant's request for a review and modification of the Board's prior Order is denied. Having carefully reviewed the entire evidentiary file, the Board affirms the Review and Modification Award.

AWARD

WHEREFORE, the Board affirms the October 14, 2015 Review and Modification Award.

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Honorable Gary K. Jones